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Nos. ~~633~~ 42
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# In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER
*v.*
BOSTON BUICK COMPANY

UNITED STATES OF AMERICA, PETITIONER
*v.*
IRON CAP COPPER COMPANY

**PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF**

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**PETITION FOR WRITS OP CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF**

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**PETITION**

The Solicitor General, on behalf of the United States of America, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the First Circuit entered in the above-entitled causes on November 5,

1929, affirming the judgments of the United States District Court for the District of Massachusetts.

STATEMENT

*Boston Buick Company Case.*—The facts as stipulated were substantially as follows:

On or about February 26, 1924, the corporation was notified by the Commissioner of Internal Revenue of an overassessment of $23,181.08 in its income and profits taxes for the fiscal year ended July 31, 1918, and was advised that the amount of the overassessment would be made the subject of a certificate of overassessment to be forwarded through the office of the Collector of Internal Revenue at Boston, and to be applied by him in accordance with Section 252 of the Revenue Act of 1921. (R. 6, 7.)

The overassessment in question was listed upon a schedule of overassessments, Form 7805, which was certified by the Commissioner of Internal Revenue under date of March 14, 1924, and forwarded to the Collector of Internal Revenue at Boston. (R. 7–8.) The certificate of the Commissioner directed the Collector to check the accounts of the taxpayers whose names appeared on the schedule, to determine whether or not their liabilities should be reduced by abatements, and if so, to make such abatements. (Ex. A, R. 8.) With reference to credits he directed the Collector as follows (Ex. A, R. 8):

> If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805–A).

The Collector followed the directions of the Commissioner and on July 11, 1924, reported on Form 7805 and Form 7805–A that the entire amount of the overassessment had been found to be an overpayment and had been credited to taxes due from the corporation for other years, leaving no amount refundable. (Ex. A, Ex. B, R. 8.) On July 31, 1924, the Deputy Commissioner certified to the Commissioner on Form 7805–A (Ex. B, R. 8) that the items listed in Column 4 had been found to be the refundable portions of overassessments theretofore allowed and the accrued interest, if any, listed in Column 6 had been found due. On the same day the Commissioner of Internal Revenue signed the authorization on Form 7805–A which certified to the disbursing clerk of the Treasury Department the refundable amounts, Column 4, and the accrued interest, Column 6, and directed him to make payment of the totals shown in Column 7. (Ex. B, R. 8; R. 16, 23.) Nothing ap-

peared in Column 4, 6 or 7 opposite the name of the Boston Buick Company.

The corporation made application for interest on the credits. On February 1, 1926, the Commissioner allowed interest on the sum of $1,421.19, the amount of an additional assessment for the fiscal year ended July 31, 1918, from August 18, 1921, the date of such assessment, to March 14, 1924, the date on which the Commissioner signed the schedule of overassessments on Form 7805. As the Commissioner considered the latter date as the date of the allowance of the credit, the interest was computed under Section 1324 (a) of the Revenue Act of 1921. The corporation filed a claim for refund and upon its rejection instituted suit on the contention that the credits were allowed subsequent to the passage of the Revenue Act of 1924 (on June 2, 1924), and that interest on the credits should be computed under Section 1019 of the Revenue Act of 1924. (R. 9.)

The District Court gave judgment for the corporation, holding that the credits were allowed either when the Collector signed his certificate or when the Commissioner signed Form 7805–A, authorizing the Disbursing Clerk to pay the refunds and that as both dates were subsequent to June 2, 1924, Section 1019 of the Revenue Act of 1924 would govern the computation of interest. (R. 10, 15–18.)

The United States thereupon appealed to the Circuit Court of Appeals for the First Circuit, which on November 5, 1929, affirmed the judgment of the

District Court (R. 22) in an opinion reported in 35 F. (2d) 560.

*Iron Cap Copper Company Case.*—This case was tried on an agreed statement of facts (R. 6–22) except that the District Court, on the request of the United States, made special findings of fact relative to procedure in the Income Tax Unit with reference to certificates of overassessment, abatements, credits and refunds. (R. 27–40.) To save printing, the latter findings are not repeated here. The agreed facts were, in substance, as follows:

On January 28, 1924, the Commissioner of Internal Revenue notified the corporation of an overassessment of $180,322.66 in its income and profits taxes for the year 1918 and of certain deficiencies in taxes for other years. (R. 10.) On March 29, 1924, the Commissioner approved a schedule of overassessments, Form 7805, on which was listed the overassessment of the Iron Cap Copper Company. (R. 10–11.) This schedule was transmitted to the Collector at Boston and contained the directions which have been referred to above in the *Boston Buick Company case.*

The Collector followed the Commissioner's instructions and on July 14, 1924, certified on Form 7805 and Form 7805–A that $48,539.94 of the overassessment had been abated, leaving an overpayment of $131,782.72, and that he had applied $102,931.89 of the overpayment against deficiencies in tax for other years, leaving a balance to be re-

funded in the sum of $28,850.83. (R. 11–12; Ex. C, R. 16.)

On August 7, 1924 the Deputy Commissioner certified to the Commissioner on Form 7805–A the amounts found to be refundable and on the same day the Commissioner authorized the Disbursing Clerk to pay to the taxpayers entitled thereto, the amounts found to be refundable, listed in Columns 4, 6 and 7. (Ex. C, R. 16.) Opposite the name of the Iron Cap Copper Company appeared the sum of $28,850.83.

The Commissioner allowed interest on the refund made (there is no dispute as to such interest) but declined to allow interest on the amounts credited, contending that the interest should be computed under Section 1324 (a) of the Revenue Act of 1921, and under that Act no interest was due.

The corporation brought suit (after due rejection of a claim) to recover interest computed under the Revenue Act of 1924.

The District Court gave judgment for the corporation, holding that credit was allowed when the Commissioner signed the authorization on Form 7805–A to the Disbursing Clerk to pay the amounts listed theeron as refundable. (R. 41, 47–49.)

Upon appeal by the United States to the Circuit Court of Appeals for the First Circuit, judgment of the District Court was affirmed. The case was consolidated for hearing with the *Boston Buick Company case,* and a single opinion was rendered.

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that a credit of an overpayment of income and profits taxes for one year against taxes due for another year was allowed when the Commissioner of Internal Revenue signed a subsidiary schedule of refunds and credits (Form 7805–A), directing the Disbursing Clerk of the Treasury to pay the amounts listed thereon as refundable.

2. In not holding that such credit was allowed when the Commissioner signed the certificate on the schedule of overassessments (Form 7805) stating that he had allowed the overassessments appearing thereon and directing the Collector of Internal Revenue to apply any overassessments found to be overpayments against any taxes due for other years.

## REASONS FOR GRANTING THE WRITS

I. The cases raise a question, not heretofore decided by this Court, as to the time of the allowance of a claim for credit. The case of *Girard Trust Co.* v. *United States*, 270 U. S. 163, can not be said to have decided this question for the issue there involved was the date of the allowance of a claim for refund and the difference in procedure followed by the Treasury Department in the allowance of a refund and of a credit was not specifically brought to the attention of the Court.

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II. The Circuit Court of Appeals held that a credit is allowed when the Commissioner or Deputy Commissioner signs the subsidiary Schedule of Refunds and Credits, Form 7805–A, authorizing the Disbursing Clerk to make refunds of the amounts listed thereon as refundable, and that it is not allowed when the Commissioner signs the certificate of overassessments, Form 7805, and thus directs the Collector of Internal Revenue to apply any part of the overassessments found to be overpayments against any taxes due from the taxpayers for other years. This decision overturns the rule as to the computation of interest on credits followed by the Bureau of Internal Revenue in a vast number of interest cases and substitutes a rule which can not uniformly be applied. For example, in cases where there are no refunds to be made and there is no interest to be paid on credits listed on the subsidiary schedule, Form 7805–A, that schedule is not at any time signed by the Commissioner. Moreover, the result of such a rule would be incongruous because, since the Collector in every case actually applies the overpayment for one year against the tax due for another year upon receiving the schedule of overassessments from the Commissioner, he would thus reduce the liability of the taxpayer prior to the time that the credits would be regarded as "allowed" and in some instances without any "allowance" by the Commissioner.

III. There is some conflict in the decisions of the lower Federal courts. While the Court of Claims in the case of *Swift and Co.* v. *United States,* unreported, decided May 6, 1929 (petition for rehearing denied December 2, 1929), has adopted the view of the Circuit Court of Appeals for the First Circuit in the instant cases, the District Court for the Western District of Pennsylvania in the case of *Penn Smokeless Coal Co.* v. *United States,* 34 F. (2d) 205, has held *contra.*

IV. The cases are of vital importance to the Government and to the public, not only because of the millions of dollars involved in a great number of pending interest cases and in those that will arise, but also because of their effect on questions involving the statutes of limitation. If the date of the allowance of a credit is the date when the Commissioner signs the subsidiary schedule of refunds and credits, then millions of dollars of taxes have been collected through the application of credits after collection was barred by the statutes of limitation. On the other hand, large sums have been applied as credits to reduce tax liability after the expiration of the period prescribed for making such credits.

Wherefore, it is respectfully submitted that the petition should be granted.

CHARLES E. HUGHES, JR.,
*Solicitor General.*

FEBRUARY, 1930.

## BRIEF IN SUPPORT OF THE PETITION

### OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the First Circuit (*Boston Buick Company case,* R. 22; *Iron Cap Copper case,* R. 53) is reported in 35 F. (2d) 560. The opinions of the District Court for the District of Massachusetts (*Boston Buick Company case,* R. 15; *Iron Cap Copper case,* R. 47) are reported in 27 F. (2d) 395 and 31 F. (2d) 628.

### JURISDICTION

The judgments of the United States Circuit Court of Appeals for the First Circuit were entered on November 5, 1929. (*Boston Buick Company case,* R. 22; *Iron Cap Copper case,* R. 53.) The jurisdiction of this Court rests on the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Prior to the passage of the Revenue Act of 1924 the Commissioner of Internal Revenue signed a certificate on Form 7805, stating that the overassessments appearing thereon had been allowed and directing the Collector to apply any overpayments against any taxes due from the taxpayers for other years. Subsequent to the passage of the Revenue Act of 1924 the Collector returned Form 7805 to

the Commissioner with Form 7805–A, showing the amounts credited and the amounts refundable and the Commissioner thereafter signed Form 7805–A, directing the Disbursing Clerk to make payment of the amounts refundable. The question is:

Whether interest on the credits should be computed under Section 1324 (a) of the Revenue Act of 1921 or under Section 1019 of the Revenue Act of 1924; or, to state it another way, whether the credits were allowed when the Commissioner originally signed the schedule of overassessments, Form 7805, or when he signed the schedule of refunds and credits, Form 7805–A.

**STATUTES INVOLVED**

Revised Statutes, Sec. 3218 (U. S. C., Title 26, Sec. 147):

> Every collector shall be charged with the whole amount of taxes, whether contained in lists transmitted to him by the Commissioner of Internal Revenue, or by other collectors, or delivered to him by his predecessor in office, and with the additions thereto, with the par value of all stamps deposited with him, and with all moneys collected for penalties, forfeitures, fees, or costs; * * *.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, 1085, 1145:

> SEC. 250. (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the cor-

rect amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of Section 252. * * *

SEC 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration

of such five years a claim therefor is filed by the taxpayer.

SEC. 1316. (a) That section 3220 of the Revised Statutes is hereby amended to read as follows:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

Revenue Act of 1921, c. 136, 42 Stat. 227, 264, 268, 316:

SEC. 250. (b) Same as Section 250 (b) of the Revenue Act of 1918, above quoted.

SEC. 252. Same as Section 252 of the Revenue Act of 1918, above quoted.

SEC. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

Revenue Act of 1924, c. 234, 43 Stat. 253, 296, 301, 346 (U. S. C., Title 26, Secs. 1045, 1046, 1065, 153):

SEC. 271. As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

SEC. 272. If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount

determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281.

SEC. 281. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

SEC. 1019. Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against

> which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

## STATEMENT

A statement of the facts and errors relied upon will be found in the petition except that the facts relating to procedure in the Bureau of Internal Revenue which are found in the special findings of fact in the *Iron Cap Copper Company case* (R. 27–40) are not repeated. They will be referred to in the argument.

## ARGUMENT

The sole question involved in these cases is whether interest on an overpayment of taxes for one year applied as a credit against taxes due for another year should be computed in accordance with the provisions of Section 1324 (a) of the Revenue Act of 1921 or in accordance with the provisions of Section 1019 of the Revenue Act of 1924.

Petitioner and respondent agree that this question depends solely on when the credit was allowed and the Circuit Court of Appeals has so held. In this respect it is conceded that the cases are controlled by the decisions of this Court in *Girard Trust Co.* v. *United States*, 270 U. S. 163; *Blair* v. *Birkenstock*, 271 U. S. 348; and *United States* v.

*Magnolia Petroleum Co.*, 276 U. S. 160, which recognize that the computation of interest on refunds shall be made under the Act in force when the refund is allowed.

The Circuit Court of Appeals has held that the allowance of a credit occurs when the Commissioner of Internal Revenue certifies to the disbursing clerk that the amounts shown to be refundable on the schedule of refunds and credits, Form 7805–A, should be paid, and that, since the certification in each case occurred after the passage of the Revenue Act of 1924, the interest should be computed in accordance with the provisions of that Act.

In so holding the Circuit Court of Appeals relied principally upon the decision of this Court in *Girard Trust Co.* v. *United States, supra*, in which it was held that a refund is allowed when the Commissioner signs Form 7805–A authorizing the disbursing clerk to pay the amounts shown on the schedule of refunds and credits, Form 7805–A.

It is our view that this case is not controlled by the decision in the *Girard Trust Company case* and that there are reasons for holding that the allowance of a credit does not occur at the same time as does the allowance of a refund.

Particular attention is, therefore, directed to the *Girard Trust Company case*. In that case a Schedule of Overassessments was signed on December 9, 1922, on which appeared overassessments of

$182,583.72 for the year 1920 and $107,372.36 for the year 1917 in favor of the *Girard Trust Company*. Upon the receipt of the schedule, the Collector applied $98,101.29 of the overassessment for the year 1920 as an abatement, $21.41 was credited against taxes for other years, and $84,416.02 was reported as an excess overpayment after making the credit. The $107,372.36 for the year 1917 was reported as an overpayment. The authorization to the Disbursing Clerk to pay the amounts refundable was signed by the Commisioner on January 16, 1923. The check in payment of the refund was dated February 10, 1923, and was received on February 20, 1923. The Commissioner allowed interest on the refundable portions from the date of payment computed to December 9, 1922, on the theory that the refunds were allowed on the date on which the Commissioner signed the Schedule of Overassessments. The Girard Trust Company contended that it was entitled to interest to the day when it received payment of the refunds on the theory that that was the date of the allowance of the refund.

The issue, therefore, was clearly defined between the company and the Government. It related solely to interest on *refunds*. No question was raised as to interest on the $21.41 credited, or as to the date of allowance of a credit, either before the Court of Claims or before this Court. No distinction was drawn in the briefs of either party between

the allowance of a credit and the allowance of a refund. This Court, in allowing interest to January 16, 1923, the date upon which the Commissioner authorized payment of the refund, said (p. 169):

> If Congress had intended that interest should be allowed to the date of the payment, it seems to us it would have said so. Allowance in its ordinary sense does not mean payment, and in the practical administration of the Treasury Department the two things are quite different. The one is a decision by the competent authority that the payment should be made. The other is the actual payment. The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section.

In view of these facts, we submit that the *Girard Trust Company case* should not be considered as having decided the question as to when a credit is allowed. We recognize, however, that that case established two principles which are equally applicable to the allowance of a credit, namely: (1) that the allowance of a refund occurs when there is a decision by competent authority that a refund should be made, and (2) that a statute providing for the computation of interest should be construed

in the light of the difficulties of government bookkeeping and accounting.

As in the case of a refund, the "competent authority" who allows a credit is the Commissioner of Internal Revenue. See Section 250 (b) and Section 252 of the Revenue Acts of 1918 and 1921, *supra;* Sections 271, 272 and 281 (a) of the Revenue Act of 1924, *supra;* Section 3220 R. S. as amended by Section 1316 (a) of the Revenue Act of 1918, *supra.* Accordingly, the question as to when a credit is allowed must be determined with reference to acts of the Commissioner.

The first action taken by the Commissioner in reference to the credits in these cases was taken in March, 1924, when he approved the two schedules of overassessment, Form 7805, on which overassessments in favor of the Boston Buick Company and the Iron Cap Copper Company were listed. (*Boston Buick Company case,* R. 7–8; *Iron Cap Copper case,* R. 10–11.) In each case, the certificate signed by the Commissioner contained the following instructions.

> The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Claim for Abatement" attached thereto.
>
> You will immediately check such items against the accounts of the several tax-

payers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805–A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7805–A) referred to above, and an appropriate *memorandum* made upon the taxpayers' account.

You will thereupon complete and certify this schedule and the schedule upon Form 7805–A, and return the necessary copies of each to the Commissioner of Internal Revenue.

It is submitted that these instructions constitute a positive order to make the credit and reduce the tax liability. It is true that the Commissioner does not name the specific amount to be credited but he directs the Collector to examine the accounts, to

ascertain the amount of taxes due, and to apply the credit to the extent that it is necessary to discharge the liability. The Collector has no discretion except to act as the Commissioner directs and as the state of the accounts warrants.

If this be not the allowance of a credit it is difficult to see what language the Commissioner could use for his directions to constitute the allowance of a credit. To hold that this authorization by the Commissioner does not constitute an allowance of a credit is to hold that a taxpayer's tax liability may be discharged without the credit having been allowed by any authority.

When the Commissioner directs the Collector to ascertain whether any portion of the overassessment constitutes an overpayment and to apply the overpayment as a credit, he has made a final decision as to the disposition of the overpayment by way of credit and he never thereafter, either in a certificate of any kind or in a communication to the Collector, directs an allowance of a credit or refers to the allowance of a credit.

It is our position, therefore, that the credits in the cases at bar were allowed in March, 1924, when the Commissioner signed the certificate on Form 7805, and that as this action occurred prior to the passage of the Revenue Act of 1924 interest on the credits should be computed under the Revenue Act of 1921.

The court below, however, has disregarded the fact that the Commissioner takes no further ac-

tion as to the allowance of credits after he makes his original certification on Form 7805 and has considered that he takes the same action with respect to credits as he does with respect to refunds.

It is true that the instructions of Form 7805 which were signed by the Commissioner directed the Collector to enter on Form 7805–A the amounts which were credited. (*Boston Buick Company case*, Ex. B, R. 8.) It is significant, however, that the Collector's certificates on Form 7805 (*Boston Buick Company case*, Ex. A, R. 8) stated that certain amounts had been *applied as abatements and credits* and that other amounts were "refundable."

It further appears from the exhibits that, in accordance with the practice then in effect, upon the return of the schedules the Deputy Commissioner certified to the Commissioner the refundable portions of the overassessments and the accrued interest. His certificate made no reference whatever to the amount of the abatements or to the amounts credited.

Nor did the certificate subsequently signed by the Commissioner contain any reference to credits. This certificate was no more than an authorization to the Disbursing Clerk of the Treasury to pay to the taxpayers entitled thereto the refunds and interest due. The certificate is not directed to the Collector, nor to the taxpayer, nor to any one who might be concerned directly or indirectly in the *credit* in question. It refers neither directly nor indirectly to a credit. As a matter of fact, the Col-

lector was never notified of the signing of the certificate on Form 7805–A by the Commissioner and he took no further action after the Commissioner signed it. Comparing the certificate of the Commissioner, directed to the Collector, which appears on the Schedule of Overassessments, Form 7805, with the certificate of the Commissioner directed to the Disbursing Clerk of the Treasury, which appears on the Schedule of Refunds and Credits, Form 7805–A, it is submitted that the credit was allowed in the certificate to the Collector and not in the authorization to the Disbursing Clerk of the Treasury.

This view finds further support when consideration is given to procedure in the Income Tax Unit and to the consequences which would flow from the adoption of the rule that a credit is not allowed until Form 7805–A is signed by the Commissioner.

The most obvious difficulty arises from the fact that under the procedure in effect when these credits were allowed the Commissioner did not in every case sign Form 7805–A. In any case where Form 7805 was returned from the Collector with the statement that there were no items refundable and no interest was to be paid on credits, the schedule was filed without being signed by the Commissioner. (*Iron Cap Copper case*, R. 35.)

Moreover, under the procedure which existed prior to the time that interest was allowed on credits, that is, prior to the passage of the Revenue Act of 1921 on November 23, 1921, credits were not

listed on the subsidiary schedule, and the instructions to the Collector directed him to prepare a schedule of refunds only in cases where there were refunds. (*Iron Cap Copper case*, R. 28–31.) At the present time and in fact since January, 1927, Form 7920 has superseded Forms 7805 and 7805–A. Under the procedure governing the use of that form, the Commissioner makes only one certification. This certification contains instructions to the Collector practically identical with those on Form 7805, to which are added the following instructions (*Iron Cap Copper case*, R. 37):

> The DEPUTY COMMISSIONER of Internal Revenue will compute the interest payable, list the same in column 8, and enter the respective total amounts payable in column 9 or 10, or both.
>
> The DISBURSING CLERK, Treasury Department, is authorized to pay the amounts specified in column 9 or 10, or both.

It is thus apparent that the Circuit Court of Appeals in these cases has adopted a rule for the computation of interest which can not uniformly be applied without reaching the conclusion that credits totalling millions of dollars have been allowed without authority either because they were allowed after the statute of limitations had expired or because the Commissioner never in fact signed the subsidiary schedule of refunds and credits.

The Bureau of Internal Revenue has consistently taken the position that a credit is allowed when the

Commissioner of Internal Revenue signs the schedule of overassessments except during the period when Treasury Decision 3850, Cumulative Bulletin V–1, p. 354, was in effect. This decision which published the *Girard Trust Co.* decision with head notes indicating that it was applicable to credits as well as to refunds, was approved April 8, 1926, but was revoked by Treasury Decision 3919, approved August 25, 1926, Cumulative Bulletin V–2, p. 209. The rule that a credit is allowed when the schedule of overassessments is approved by the Commissioner is a rule which can be applied uniformly and is adapted to the Treasury Department's system of bookkeeping. Under the Revenue Act of 1926, by express enactment refunds are regarded as allowed on the date when the certificate of overassessment is signed. (Sec. 1116 (b) (2) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 119; U. S. C. App., Title 26, Sec. 153.)

The rule of the Internal Revenue Bureau has been approved by the District Court for the Western District of Pennsylvania in the case of *Penn Smokeless Coal Co.* v. *United States*, 34 F. (2d) 205. On the other hand the Court of Claims in the case of *Swift and Co.* v. *United States*, unreported, decided May 6, 1929 (petition for rehearing denied December 2, 1929), has adopted the same views as the Circuit Court of Appeals for the First Circuit in the instant case. Petition for certiorari will be filed in the *Swift and Company case.*

## CONCLUSION

In view of the general importance of the questions decided we submit that this petition for writs of certiorari should be granted.

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